

Western Australian Auditor General's Report



Opinion on Ministerial Notification



Report 11: June 2017

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WESTERN AUSTRALIAN AUDITOR GENERAL'S REPORT

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**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

OPINION ON MINISTERIAL NOTIFICATION

This report has been prepared for submission to Parliament under the provisions of section 24 of the *Auditor General Act 2006*.

This report deals with 2 decisions by the then Minister for Water, the Hon Mia Davies MLA, not to provide Parliament with business cases from the Water for Food program.

I wish to acknowledge the cooperation of the staff at the Department of Water.

A handwritten signature in black ink, appearing to read 'C. Murphy'.

COLIN MURPHY
AUDITOR GENERAL
29 June 2017

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Ministerial decisions not to provide information to Parliament

Introduction

This report deals with 2 decisions by the then Minister for Water, the Hon Mia Davies MLA, not to provide Parliament with business cases from the Water for Food program.

Section 82 of the *Financial Management Act 2006* (the FM Act) requires a Minister who has decided not to provide requested information to Parliament, to give written notice to both Houses of Parliament and the Auditor General within 14 days of that decision.

Section 24 of the *Auditor General Act 2006* requires the Auditor General to provide an opinion to Parliament as to whether the Minister's decision was reasonable and appropriate.

What did we do?

The Audit Practice Statement on our website (www.audit.wa.gov.au) sets out the process we follow to arrive at our section 82 opinions, including:

- a review of agency documents
- a review of any advice provided to the relevant Minister by agencies, the State Solicitor's Office or other legal advisers
- interviews with key agencies, including discussions about our draft findings and the Auditor General's opinion.

Our procedures are designed to provide sufficient appropriate evidence to support an independent view to Parliament on the reasonableness and appropriateness of the Minister's decision.

In conducting our assessment, we considered state and federal legal advice about the application of Cabinet-in-confidence.

We have not performed an audit, however, our procedures follow the key principles in the Australian Auditing and Assurance Standards.

Opinion

The decisions by the Minister not to provide the information requested by Parliament were not reasonable and therefore not appropriate, as a significant amount of the information was already publicly available. However, the Minister followed an appropriate process in that her decisions were consistent with the advice she was provided and the advice was from a proper source and sufficiently convincing.

The Department of Water's advice to the Minister was nevertheless incorrect in that it failed to advise the Minister that much of the business case was already publicly available and that these components could be released.

Background

This Opinion deals with 2 parliamentary questions about the Water for Food program, which includes 11 projects designed to increase irrigated agriculture in WA. Water for Food is funded through the Royalties for Regions program.

Legislative Council Question on Notice 4396

In Parliament on 13 September 2016, Hon Darren West MLC asked the Minister:

- (1) *Has a business case been prepared for each Water for Food project?*
- (2) *If yes to (1), will the Minister table business cases for each Water for Food project?*
- (3) *If no to (2), why not?*

On 17 November 2016, the Minister declined to table the business cases, replying:

- (1) *Yes*
- (2) *No*
- (3) *The business cases cannot be released as they are Cabinet-in-confidence documents.*

On 22 November 2016, the Minister notified the Auditor General of her decision not to provide the requested information in accordance with section 82 of the FM Act.

Legislative Council Question on Notice 4565

In Parliament on 20 October 2016, Hon Robin Chapple MLC, asked the Minister¹:

I refer to the Water for Food project at Mowanjum, and I ask:

- (b) *will the Minister release the business case for the project;*
- (c) *if no to (b), why not;*

On 23 November 2016, the Minister declined to table the Mowanjum project business case, replying:

- (b) *No*
- (c) *The business case is not available for release as it is Cabinet-in-confidence.*

¹ Question 4565 included 15 parts (a to o). This section 82 notice concerns only parts (b) and (c).

On 25 November 2016, the Minister notified the Auditor General of her decision not to provide the requested information in accordance with section 82 of the FM Act.

Key findings

The decisions by the Minister not to provide the requested information failed to recognise that a significant amount of the information was already publicly available.

The Minister properly sought advice from the Department of Water before responding to the requests. The Department recommended that the Minister should not provide the business cases as they were prepared and submitted to Cabinet and were covered by Cabinet-in-confidence.

The Department told us that it consulted with the State Solicitor's Office (SSO) in preparing its briefing to the Minister and included parts of the SSO advice in its briefing notes. However, we were denied access to the SSO advice for reason of legal professional privilege.

Nevertheless, it was evident from the information available to us, that the Department did not provide the Minister with a detailed analysis of why Cabinet-in-confidence applied to the requested information. It was also evident that the Department did not properly consider or advise the Minister of the option of releasing the business cases after redacting those parts that were not already publicly available or commercially sensitive.

In assessing the argument for Cabinet-in-confidence, we reviewed the business cases and the Department's advice against the following considerations²:

- Was the information created for the purpose of informing Cabinet or being discussed in Cabinet? Does it include policy options or recommendations prepared for submission to Cabinet?
- Does the information contain material that would reveal the deliberation and decisions of Cabinet?
- Is part or all of the information publicly available, or readily available within the agency?
- Did the Minister consider providing any sections of the information that would not reveal deliberations and decisions of Cabinet?

Water for Food project business cases were provided within 2 submissions to Cabinet in 2014. We reviewed the business cases and found that their main purpose was to seek Royalties for Regions funding through Cabinet. They contained key project information, agency analysis and recommendations to fund the projects.

We found that when the questions were asked, the Cabinet decisions to fund the projects and a large amount of the information in the business cases were already publicly available. By September 2016, Water for Food projects had been approved by Cabinet and were in progress. The government had published project information online, in media releases, reports and agency website content. Within these we found information that formed large parts of the business cases, such as project objectives, locations, outcomes and funding allocations. We also found that some sections of the business cases were drawn from existing publications, such as the 2005 State Water Strategy.

Small discrete sections of the business cases contained information that is not publicly available, and could reveal Cabinet deliberations or be commercially sensitive.

² An explanation for the basis of these is contained in Auditor General's report 18 of 2016, *Opinion on Ministerial Notifications*.

In its advice to the Minister, the Department provided an assessment that a private company's business plan attached to one of the submissions, is commercially sensitive. The Department also noted that the plan had been provided with the understanding that it would be kept confidential. During our review we assessed the plan at a high level and agreed that it contains material likely to be commercially sensitive, such as financial and operational forecasts. We agree that in these specific instances the information should be held in confidence.

However, it is our view that the Water for Food business cases could have been released, with the confidential parts redacted.

Response from the Department of Water

The Department of Water acknowledges the findings of the Auditor General.

In advising the Minister, the Department makes every effort to ensure that it recommends that information that can be disclosed is disclosed, and is alert to the need to consider options for doing this, including through the redaction of information and disclosure of the remainder of a document where appropriate.

In relation to the two business cases in question, it was the Department's view, and remains the Department's view, that these business cases were prepared for submission to Cabinet (a matter which is acknowledged by the Auditor General in this Report) and as such they attract Cabinet privilege, an incident of public interest immunity. It is not at the discretion of the Department to act in a manner inconsistent with that privilege. As such, the Department considered that the business cases could not be disclosed.

The Department regularly provides information to the public in relation to its activities, including Water for Food projects. The Department does this as part of the proper discharge of its functions as a Government agency to promote open and accountable Government. It does this without reference to the specific content and context of any Cabinet materials and maintains that Cabinet privilege continues to apply to the business cases.

The Department advised the Minister accordingly, following appropriate processes for the preparation and dissemination of its advice. The question of whether the Minister acted reasonably and appropriately is one that must be seen in that context: the question for the purposes of section 82 of the Financial Management Act 2006 and section 24 of the Auditor General Act 2006 is not one that equates to considering the legal correctness of the decision made by the Minister (although the Department maintains that the Minister's decision was legally correct). The Minister sought and received proper advice from the Department as was appropriate in the circumstances. It was proper for the Minister to have relied upon that advice and to do so was "reasonable and appropriate" in all the circumstances.

Auditor General's Reports

Report number	2017 reports	Date tabled
10	Timely Payment of Suppliers	21 June 2017
9	Opinion on Ministerial Notification	8 June 2017
8	Management of Medical Equipment	25 May 2017
7	Audit Results Report – Annual 2016 Financial Audits – Universities and TAFEs – Other audits completed since 1 November 2016	11 May 2017
6	Opinions on Ministerial Notifications	13 April 2017
5	Accuracy of WA Health's Activity Based Funding Data	11 April 2017
4	Controls Over Purchasing Cards	11 April 2017
3	Tender Processes and Contract Extensions	11 April 2017
2	Opinion on Ministerial Notification	6 April 2017
1	Opinion on Ministerial Notification	30 March 2017

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